CRIMINAL PROCEDURE AMENDMENT (TRIAL BY JUDGE ALONE) BILL 2017

Second Reading

Resumed from 7 December 2017.

HON SUE ELLERY (South Metropolitan — Leader of the House) [10.22 am]: I thank Hon Aaron Stonehouse for bringing before the house the Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017. The member is already aware that the government is not able to support this private member's bill. The honourable member put considerable work into this private member's bill. I note that he had several conversations with the Attorney General, and the Attorney General in turn consulted with the courts and various other stakeholders. I know that Hon Aaron Stonehouse has consulted across the profession about the policy intent of this bill. Looking at the material that was prepared for me by the Attorney General, it shows that this is something that has been ventilated in the profession for some time. Various legal academic papers have been written about the merits or otherwise of doing this. Some high-profile legal practitioners in Western Australia have made comments about the need for this kind of policy shift. It is not something that is new and it is not something that the profession has not had time to develop a view on. It is an interesting concept and I am going to talk in a minute about why the government is not in a position to support the bill.

The bill seeks to amend section 118 of the Criminal Procedure Act 2004 to allow for a defendant to request that their trial be heard by judge alone. I will go to those provisions in a minute. At present, the onus is on the accused to argue why this should occur. Hon Aaron Stonehouse is of the view that the prosecution should bear the onus of convincing the court to hold a jury trial when a trial by judge alone has been requested by the accused. Section 118 of the Criminal Procedure Act is titled "Trial by judge alone without jury may be ordered". It sets out the criteria by which such a trial may be ordered. Section 118(1) states —

> If an accused is committed on a charge to a superior court or indicted in a superior court on a charge, the prosecutor or the accused may apply to the court for an order that the trial of the charge be by a judge alone without a jury.

Subsections (2) and (3) set out at what point the application must be made and that the court has an obligation to inform itself once an application has been made.

The private member's bill that is before us now would delete section 118(4), (5) and (6) of the existing legislative framework, which states —

> (4) On such an application the court may make the order if it considers it is in the interests of justice to do so but, on an application by the prosecutor, must not do so unless the accused consents.
>
> (5) Without limiting subsection (4), the court may make the order if it considers —
>
> (a) that the trial, due to its complexity or length or both, is likely to be unreasonably burdensome to a jury; or
>
> (b) that it is likely that acts that may constitute an offence under *The Criminal Code* section 123 would be committed in respect of a member of a jury.
>
> (6) Without limiting subsection (4), the court may refuse to make the order if it considers the trial will involve a factual issue that requires the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness.

The bill that the honourable member has put before the house proposes to delete those three subsections and insert two new subsections. The proposed subsections state —

> (4) Except as provided in subsections (5), (7) and (8), the court must make the order unless the court is satisfied that the order is not in the interests of justice.
>
> (5) If the application is made by the prosecutor, the court must not make the order without the consent of the accused.

The member has argued that this is an important change to make because it will simplify the processes of the court. He also argued that it will lead to shorter trial times, reduce the incidence of appeals and promote freedom of personal choice. In the bill and in the comments that have been made in the public debate about this, the test for a trial by judge alone would be whether it is in the interests of justice. Trials by judge alone are already available. I have just read the provisions in the relevant act that set out how that is achieved. When the accused satisfies the court that one is warranted, the appeal of a trial by judge alone in such cases is founded upon the great confidence that we have in judges' capabilities, but what we do not have is significant empirical evidence to suggest that judges are significantly more capable than jurors to put prejudicial information to one side in decision-making. I do not make that comment as a slight on the judiciary at all, but there just is not widespread empirical evidence.

It is worth noting as an aside that the government has already flagged and started significant reform in the judicial system—the Court Jurisdiction Legislation Amendment Bill 2017 having been read in. That bill will amend the District Court of Western Australia Act 1969 and the Criminal Code to alter the criminal jurisdiction boundaries between the Supreme Court, District Court and Magistrates Court and it will confer jurisdiction for indictable offences other than homicide to the District Court, which will of itself inevitably increase the workload. If we add that to the additional judicial resources provided to the District Court in last year's budget, we expect the capacity of the court to be optimised within 12 months. However, it will take some time for those changes to settle in, and that is another reason the government is not supportive of the changes that Hon Aaron Stonehouse is proposing, because that will place additional pressure on the court.

Although we certainly acknowledge the policy intent of the bill and that a debate is taking place that is broader than the honourable member intended, the bill is neither viable nor practical. An increase in the number of judge-alone trials, particularly in the District Court, would require the government to commit significantly more judicial resources to the court. The Attorney General undertook to consult with the courts about the proposed private member's bill. I want to refer in particular to advice provided to the Attorney General by the Chief Judge of the District Court. It is the unequivocal view of the Chief Judge that the bill proposed by the member would not be acceptable, because it would require a significant increase in resources. He makes the point in the advice that he gave to the Attorney General that the District Court is a busiest jury trial court in the state. He said that he would oppose any change that might significantly increase the number of judge-alone trials that are conducted in the District Court. He makes the point also that the District Court already applies a range of measures to maximise the use of resources by what is the busiest court in this state and ensure that they are used in the most effective way. He says that if judges were required to conduct judge-alone trials, they would need to be given time out of court to prepare written decisions, and that is likely to have a flow-on effect on the listing policies of the District Court and cause significant delays. In his view, it would also impact significantly on the morale of the judges of the court if they were required to conduct judge-alone trials on a regular basis, because that would create additional workload.

He also addresses the view put by Hon Aaron Stonehouse that if the proposals in his bill were implemented, they would have the effect of shortening the average time of trial, thereby reducing costs and resulting in fewer appeals. The Chief Judge of the District Court does not agree that that will be the case. He does not believe that the average trial time will be shortened or that there will be a significant reduction in costs. He also does not accept that there will be a reduction in the number of appeals. In fact, he believes it is likely that there will be more appeals as reasons for verdicts are challenged. He is very firmly of the view that this would not have the effect the member has said it would have but in fact would have the complete opposite effect.

For those reasons, the government is not in a position to support this legislation. We acknowledge that for a considerable time, an academic debate has been conducted in the legal profession, and a public debate has been conducted by some particularly high-profile practitioners and senior practitioners in Western Australia. Nevertheless, in the current circumstances, the government's view is that the impact of this bill would not be what the honourable member thinks it would be but in fact would be the reverse. For those reasons, the government will not be supporting this private member's bill.

HON CHARLES SMITH (East Metropolitan) [10.34 am]: I would like to thank Hon Aaron Stonehouse for introducing into the house another interesting private member's bill, the Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017. His other private member's bill, the Misuse of Drugs Amendment Bill 2018, is also an interesting bill. I am just sorry that I did not bring in a violin this morning to play a tune to that sad story that the member has told the house.

The honourable member's bill presents an honourable intention—to streamline the court process. However, as the member concedes in his second reading speech, he has no legal training, and that is unfortunately self-evident in this particular case. The amendments proposed by the honourable member appear to remove the ability of the courts to consider making an order for a judge-only trial not only in cases of complexity or burden, but also in cases in which the court considers that a juror may be threatened or corrupted by the accused. Furthermore, it seeks to remove the court's ability to refuse an application for a judge-alone trial if the issue involves objective community standards. How can the law rely on the standard of the average person if the average person cannot be consulted in the court? When faith in the legal system is already pretty low, and when magistrates arguably fail to meet community expectations, allowing an accused to decide whether the community should make an informed decision will serve only to lower that faith. Although I acknowledge that valid criticisms can be made about the efficiency of the courts, efficiency cannot take precedence over justice.

The honourable member's bill takes a prescriptive and clear set of considerations and replaces them with a shorter and more vague approach, which will serve only to favour the accused and their chances of escaping charges, rather than serve the interests of justice. The honourable member needs to keep in mind that an accused is merely

an individual, whereas the prosecution represents, and acts in the best interest of, the community. Although valid criticisms can be made of the court system, this bill is not the way to fix it.

I would suggest a more radical and efficient response to this issue. I would propose a bill to introduce a truth-seeking or inquisitorial criminal court, along continental European lines, with specially trained judges who can get to the truth—that long-lost part of our justice system—enable a quicker turnaround in prosecutions, and ensure safer convictions and fewer incidents of miscarriage of justice.

If the honourable member wants to amend the Criminal Procedure Act 2004, he would be better served by seeking to amend section 118(1) to allow the accused, as well as the prosecution, to make an application for a trial by judge alone. This would provide the choices that he wants without adversely affecting the court's ability to make decisions on serious matters.

However, the honourable member should perhaps reconsider his position entirely. A party is currently innocent until proven guilty. However, a party should not be afforded the ability to decide what is most likely to "get them off" on a charge. That is not justice. Justice should be held against objective community standards as reflected in our Australian values and our Criminal Code. Justice should be held not against what the accused thinks would be more fair, but against what society thinks is fair. That is done through judges, prosecutors and the community.

HON MICHAEL MISCHIN (North Metropolitan — Deputy Leader of the Opposition) [10.38 am]: I have listened with interest to the contributions on the Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 by not only Hon Aaron Stonehouse, who sponsored the bill, but also the Leader of the Government, and Hon Charles Smith, who put his view about the way in which the justice system operates and should operate. I have to say that I have some sympathy for the objectives that have been proposed by Hon Aaron Stonehouse. Since the introduction into the Criminal Procedure Act of the option of a trial by a judge alone—I note there was a version of that even before that act came into being—the move by those in the legal profession who seek to represent the interests of those accused of serious crimes by abolishing our jury system, or at least to have access to a trial by jury limited to the discretion of the accused person, has gained momentum. When it is dressed up in matters of principle, it has some force. However, it ought not to be thought for a moment that some tactical or strategic advantage does not underlie that sort of approach. The reason that a criminal lawyer may wish to have his or her accused tried by a judge alone is to obtain an advantage for that person and to increase their prospects of acquittal. That is a fair enough objective. Likewise, the reason that one might resort to a trial by jury may be that it will increase the prospects of an acquittal. Again, that is a fair enough objective. It is balanced from the point of view of a lawyer representing an accused person considering the interests of that client, not the achievement of justice in any abstract sense.

A different obligation lies on the prosecution and on the courts. Members of the prosecution by way of not only statements of prosecution principles and guidelines, but also longstanding conventions and ethical requirements fight not for conviction but for the proper presentation of a case so that it can be dealt with in accordance with law and principles of justice by an independent tribunal—namely, a court. The emphasis is a different one. Any applications that are brought to a court by a prosecution to seek trial by judge alone are informed by those considerations, not simply strategic or tactical considerations of what will achieve the best result. They have to be justified accordingly. As the law now stands, there is a check in that respect.

I note that Hon Aaron Stonehouse proposes an introduction as part of his amendment that the court cannot make an order for trial by judge alone if it is persuaded by or becomes satisfied on the material that it is not in the interests of justice. That throws into question just what the interests of justice might be in that particular case. The sorts of cases that tend to become judge-alone trials are constrained under the current legislation. Considerations are complexity, length of trial—through its particular circumstances, it might be unreasonably burdensome to a jury—or some risk of tampering with the jury. The bias in our system in most serious cases in our criminal calendar has been towards trial by jury. Now is not the time to go into any detail on the reasons for trial by jury and how it evolved, but a couple of factors ought to be borne in mind in assessing the merits of proposals such as this. We need to consider why we have developed the trial system that we have, albeit with refinements and modifications over time to make it more workable.

Originally, of course, juries descended from times in Britain when we had isolated Anglo-Saxon communities of pre-medieval history—the foundations of the civilisation that we now see in a far more refined form with all its manifestations of Parliament, a judicial system and independent organs of government and the like. At that time justice was administered in a fairly small area and the juries of the time were the ones who were informed of the facts. They lived in that community. They knew one way or the other what had happened and they dealt out justice accordingly. Ultimately, that got more refined and we ended up with juries as the preliminary finders of facts. The grand jury system in many places in the United States is a development of that whereby the grand jury decides on the material that is presented to it, does some investigation, and decides whether a case needs to be advanced further. The grand jury has been abolished in our system, of course. We have been left with what used to be called

the petit jury, the small jury of 12 to which we have become accustomed. The petit jury does not know the facts other than those that have been presented by relevant admissible evidence in a court; it decides the facts while being directed by the judge on the relevant principles of law. The jury is to decide that objectively and, hopefully, without any preconceived notions or ideas of what the events have been or might have been and decide on the evidence that is properly admissible. That is what we are left with.

Undoubtedly, as with any human system, it does not work all the time. But it works most of the time and the checks and balances have been improved over time to try to refine those workings while staying true to the idea, which may be an old-fashioned one, that people ought to be judged in serious matters and their guilt or innocence declared by their peers—other members of the community. That might seem an old-fashioned concept and it may go against what Hon Aaron Stonehouse has indicated as one of the objectives of his bill. I hope nothing I say here will be interpreted by him or others as diminishing the intent behind this bill and the spirit in which he is advancing this legislation, because I genuinely believe he is trying to improve the system in a variety of ways and overcome problems and the like in accordance with his party's principles. However, at the end of the day, there are checks around the system and the reason that juries' verdicts are inscrutable is one of the important foundations in history for having a jury system. I will not go into the detail of it; in fact, much of the detail is lost on me. However, in a trial in England in 1670 a guy called William Penn, who I think may have been the founder of Pennsylvania eventually, a Quaker, and one of his offsiders, a chap called William Mead, were tried for an unlawful assembly. The jury wanted to acquit them and the judge did not like that verdict. The judge confined them without food, water, light and heat until they saw reason and delivered the verdict that the judge considered was the proper one in the circumstances. That jury held out and refused to follow the judge's wishes and maintained an acquittal of those two Quakers. It was a political issue, ultimately.

Hon Alannah MacTiernan: How long were they kept in confinement?

Hon MICHAEL MISCHIN: I do not recall now, but action ended up being taken and, as I recall, the then Lord Chief Justice came down with the principle that a judge might encourage a jury, or words to that effect, but he cannot lead them by the nose. I think it was called Bushell's case after the foreman of the jury and that established the principle that a jury's verdict is the jury's verdict. It cannot be overridden by a judge's wishes and the jury's verdict is inscrutable. I think Hon Aaron Stonehouse will appreciate this because it is one of the foundations of the principles upon which he has based much of his philosophy; to have a jury that ultimately decides is a check against the oppression of the state. It may be a perverse verdict, and we get perverse verdicts from time to time that go against the weight of the evidence and against the weight of the law. The evidence seems absolutely clear-cut as presented by the prosecution and the state, in effect, on behalf of the community, yet someone will be acquitted. There is outrage about that and people ask how that could possibly happen. What is wrong with the system? What is wrong with the system, if it is wrong, is that a jury of peers has decided a particular way for reasons best known to themselves. Of course, it might seem remarkable, irrational, unjust and terrible, and that it needs to be fixed, but in fact it is one of those principles that, when it does need to be used, is available to our system. Likewise, we will sometimes end up with a person being convicted against the weight of the evidence or what it seems to be, or community feeling, but, again, there are checks and balances in that by way of appeals on law and the like.

I would not be too quick to throw out the jury system, and it is important to question the motives of those who choose to do so. One of the elements of that is the workability of any alternative. We have seen a trend over the years—we are about to encounter another wave of this—of serious offences in our criminal calendar being shipped lower and lower down the judicial hierarchy for reasons of expedition and economy. Before there was a District Court in this state to deal with the bulk of the intermediate-level crimes—many of those so-called intermediate-level crimes in our criminal calendar are quite serious now because of the trend of pushing things further down the judicial hierarchy—indictable cases were dealt with by the Supreme Court of Western Australia. It may be apocryphal, but I was told when I was a baby prosecutor that there was one occasion back in the 1960s when the Supreme Court had no burglary trials for a month, which astonished me. Burglary was so rare that the only place it could be tried was in the Supreme Court. Oh, happy days! Now, burglaries form the bulk of the work in not only the District Court of Western Australia, but also the Magistrates Court. Notwithstanding that aggravated burglary of a dwelling carries 20 years' imprisonment, more and more burglary trials are being conducted in the District Court, and now there are moves to move some of that workload down to the Magistrates Court, where there are no juries and where they can be dealt with expeditiously and in accordance with all the principles Hon Aaron Stonehouse advocated. Whether ultimately that price and efficiency is compensated by the lack of principle of trial by peer and so forth is for others to decide, but we are seeing more and more serious cases being thrown down to the lower levels of our courts, with all the good things and bad things that come from that.

As Hon Aaron Stonehouse pointed out, there are of course some advantages, in the right kinds of cases, in having things dealt with by judge alone or by a magistrate. Summary proceedings before a magistrate can be more expeditiously listed because we do not have to worry about the empanelment of a jury and the gathering together

of a jury pool. They can be more expeditiously disposed of because evidence might be presented to the court by way of documentation and the like, which does not have to be read out or produced to a jury. It can be that in some cases a magistrate can deliver what is known as an extempore judgement and reasons for a decision and dispose of a case very quickly without having to go off and write their decision. It may be that the case involves such isolated principles, such narrow principles, that the writing of a judgement, the formulation of a judgement and its reasons, can be done with alacrity and very quickly. It may be that the magistrate is not affected in the same way as members of the public by public opinion surrounding a particular case. However, it could also work the other way. In my experience with trial by judge alone in superior court matters, in the District Court and in the Supreme Court, that can be quite the contrary in some respects. The finding of adequate court time tends to be the same. A judge is taken out of circulation for a period in the same way as with a jury trial. There is true a need for a judge to carefully craft their directions to the jury on matters of law and how they can use evidence, and that may take some time, but the jury does not have to sit down afterwards and compose detailed reasons for the decision and why they have rejected or accepted certain pieces of evidence as a trial judge would have to do, and the findings of fact are fairly limited for a jury, whereas a judge would have to go into the reasonable detail, weighing the evidence and providing his or his justification for having come to a particular view on elements of evidence, and that can be a lengthy process. It can take quite some time and it can take the judge out of circulation for extensive periods. That means that that judge is not available to do any other trials.

I will give an example. If a District Court judge goes out on circuit for a week to, say, Kununurra, that judge can deal with perhaps 20 sentencing matters, bail matters and a few things of that character and possibly get to at least two trials in a week. Once in the days when jury trials could be knocked off in a day, a judge could do several trials in a week more, but one would probably get, say, two trials in that one-week circuit. Of course, that could not be done necessarily, not if one was after a timely decision for those trials. It is possible that two trials, or even three, could be squeezed in in a week before a judge alone, but the judge has to write his or her decision sometime and in quite some detail and not just with access to their notes, but also having to go through the transcript to make it sound. That would occupy that judge's time in the future somewhere and so would take them out of circulation.

One of the considerations that needs to be borne in mind is what actual saving is involved. I take it that the Attorney General has said that he has consulted; he certainly seems to have consulted with the Chief Judge of the District Court, but I do not know with whom else. I do not know the outcome in detail of that consultation. I will have to take it on face value that it was at least what the leader has told us, but it would be interesting to know just what the implications are of such a measure in practical terms. How many judges are likely to be taken out of circulation? How many cases are likely to be trial by judge alone? What sorts of issues are likely to be involved?

Another feature of trial by jury that ought be borne in mind is that because we are dealing with a jury, the evidence has to be publicly presented. There may be limitations because of the nature of the evidence, and certain sensitive matters that might be dangerous to particular witnesses, and judges can control all of that. However, at least it is known what the evidence is against someone. I will give an example. We have had recently the case of Wark in respect of the Hayley Dodd killing. That trial took seven weeks. The decision was not delivered immediately after the trial, as one would expect with a jury verdict. The trial went from 9 October to 24 November last year. It would have been a long jury trial, but not one beyond the measure of a jury properly chosen—the Connell trial over Rothwells went for something like 18 months. There was no verdict on 24 November, or on the twenty-fifth or the twenty-sixth or the twenty-seventh; the verdict was delivered on 22 January. The judge had to work for two months to go through all the evidence and to not only craft her view on the evidence, but also articulate it, with minute examination, to make it appeal-proof and sound. It may very well be that the judge was doing other things over that time, but I do not think she was doing too many trials. Those sorts of considerations need to be weighed up as well, because if this happens, either the demand for judicial officers will increase or the system will potentially break down under its own weight. It may be that it will not; it may be that the considerations of efficiency, expedition, justice and proper results increase over time. Maybe that would happen, but I think a lot more work needs to be put into considering the implications of a measure such as this before we make such a radical change and put the bias towards the whim of the accused rather than the principle within our system that a person is tried by his or her peers in serious matters. I am entirely sympathetic to the idea behind this bill, but I do not think it can be passed in this form and on this basis.

I have to say that there was temptation for a bit of idle mischief by supporting this bill and leaving it to the Attorney General to work out in the other place. When we were in government, a number of bills were put forward for the purpose of simply making a point or of making a headline if we were to oppose them. I recall with particular amusement one that was advanced by the then opposition as a great solution to family violence—that any breach of a violence restraining order was going to be made a crime, to show how tough they were on family violence. If Hon Aaron Stonehouse breached a family violence restraining order by coming within 50 metres of someone he should not be near, it was going to be a crime. Of course, a crime is an indictable offence.

The way that particularly brilliant piece of legislation was written would have meant that such a matter would have gone to the District Court or Supreme Court for trial. Of course, that did not matter; that was put up simply to make a headline and to show how tough the then opposition was on family violence, rather than being anything sensible. We wasted an awful lot of time debating an asbestos diseases bill that we were assured was ready to go and in a proper form. Goodness me; we have been here for 18 months and I have not seen that bill back since. The temptation, just in the interests of good, clean fun, to support this bill and have the government argue its way out of justice measures and have the Attorney General argue with his former colleagues on the defence bar as to why this should not be done was great, but I do not think that is the responsible way for our opposition to behave—I would like to think that we were above all that. I am going to demonstrate that we are above all that by saying that we cannot support the bill.

This bill is an interesting idea. It is one that I think ought to be explored further and the evidence gathered. Ultimately, if there is a parliamentary committee or some other means of dealing with this, I would be delighted to learn what it comes up with, because it is something that I think does need to be considered but with the appropriate checks and balances hedged around it and with proper regard to principle. As the bill presently stands, it would not be responsible to support Hon Aaron Stonehouse's intentions because we do not know what the consequences will be. It would ultimately fail in the other place anyway if the government does not like it—it would get nowhere and disappear without a trace—but it is something that is worth properly analysing. I should add on that point that when this government came into office, the Attorney General made a lot of noise about a thing called the justice pipeline analysis. An amount of $800 000 was going to go into a mechanism whereby any potential changes to the justice system would be tracked, followed and analysed in detail to find out what the consequences would be. I have not seen anything from that process. Quite oddly, there are a number of bills before us that seek to make quite radical changes to the hierarchy of court jurisdictions and do an awful lot of things in the criminal justice sphere that plainly have not been analysed in the rigorous fashion that was proposed. I do not know why. I would have thought that, rather than rushing around like headless chickens and throwing in legislation with consequences, the government might give a little thought to that. Providing us with the implications of those changes would be helpful through some kind of analysis done under this justice pipeline concept, but, apparently, that is too hard. It is much easier just to rush in and do things and leave it for us to fix by way of parliamentary committees, which are accused of stalling legislation, and proper analysis from people who really do want to focus on getting a good result rather than a fast one.

The government has made a number of points about the possible implications. I think I have covered many of them already. If there were a trend away from jury trials, it would have implications for the workload in the two courts that primarily deal with jury trials—the District Court and the Supreme Court. It would mean a different listings process in order to deal with them. It would mean that some elements of time in a jury trial could be saved—the opening address to the jury, which is often at some length, the empanelment of the jury and directions to a jury may fall away—but they would be replaced by the time taken by the judicial officer to craft his or her reasons for decision. That may have a flow-on effect on the ability to use that judge for other trials. It may be right that it may shorten the average trial time, but it would also come at a cost of the public being able to understand the process in a trial. I might just go back to the Wark case. If one looks at the reasons for Her Honour Justice Jenkins' decision, she outlined that an awful lot of witnesses were called over those seven weeks and an awful lot of statements were tabled. The judge took them into account, I presume—she says she did—and referred to bits of them, as necessary, as part of the evidence. But if an interested member of the public were to go down to the court to find out what the trial was about, an awful lot of that evidence would not be available. It would be available, as a matter of course, to the members of the jury, because they have to see and hear it all, but if Hon Aaron Stonehouse took an interest in a particular trial and much of it was tabled, judicial notice was taken of it and it was entered into evidence, he might have no idea at all of some of the critical bits of evidence that were presented. That lack of transparency needs to be taken into account as well, because all we are left with at the end is the judge's decision and their reasons and their interpretation of the evidence.

I have no idea whether it would reduce costs. I suppose it takes out the element of costs to summon the jury pool, although if people take advantage of juries in any event in some of these cases at their whim, that mechanism and the procedures and processes to accommodate that would still need to be available. Yes, there may be some saving in paying jurors whatever they are paid a day in many cases and in the volume of jurors that it may be necessary to summon—that could work itself out over time—but how much of a saving there would be, I do not know.

Whether it would cut down on appeals, I have my doubts. At the moment in an indictable case, following a trial there is the judge's direction to a jury and, if that is sound and the jury decides what view it takes of the facts and delivers its verdict of either guilty, on the basis that it is satisfied beyond reasonable doubt, or not guilty, because it is not and expresses a reasonable doubt, that is it. The analysis is of the trial process and the judge's direction to the jury. If there are detailed reasons, with a judge expressing their view of items of evidence, that can be open to challenge. In my experience, the very few trials by judge alone in superior cases were almost inevitably followed

by appeal. I do not see why there ought to be any change in that trend, but, again, the Attorney General would have those figures. If Hon Aaron Stonehouse is interested in pursuing the issue, I think he could legitimately ask how many trials by judge alone there have been since this particular mechanism was introduced back in the 1990s, what the circumstances were, what the different types of cases were, how long they took, how long it took to deliver a verdict and the reasons for the decision, and whether there were any appeals and what the outcomes of those appeals were. I may be wrong, but my educated guess would be that in just about every case of trial by judge alone, there is an appeal. This proposal will not necessarily reduce the number of appeals and the work of the Court of Appeal. Of course, adjustments to the jurisdiction of the courts are in train, so many of these cases—at least the simple cases—will end up before magistrates in any event. This would tend to operate in the more serious cases.

One of the important areas that is reserved by the current legislation relates to objective community standards. Section 118(6) of the Criminal Procedure Act, without limiting the ability of the court in refusing applications on the basis of the interests of justice, states —

> … the court may refuse to make the order if it considers the trial will involve a factual issue that requires the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness.

That, too, is an important feature. We have seen community attitudes to those judgements change over time. I recall that back in the 1980s, a number of cases came before our courts involving comedians who were said to have infringed on our obscenity laws. Kevin Bloody Wilson is an example—whether the language he used in his act in pubs was obscene and, hence, contrary to law. I think he overused certain words in a shadow vocabulary that overcame the humour of much of what he said. It was not quite to my taste, but the fact remains that community attitudes have changed since. Some of the stuff he said for effect is now on T-shirts that people wear as they wander along Hay Street Mall. Community attitudes change about whether things are obscene, reasonable, dangerous and the like. Just to take a prosaic example, the idea that a motor car is dangerous is true, but it is not something that we would consider a dangerous object per se; whereas 150 years ago, if one appeared on the streets in Perth, there might have been a different view of it because it was an unknown thing and we were not used to it. Likewise, those sorts of things change and the best judges of the factual judgements of whether something is obscene, reasonable, negligent, careless, indecent or dangerous are our peers—members of the community. A judge might take a particular view, and it may be right as a reflection of the community, but we often hear the complaint, particularly around the time that judges impose sentences but also about many other decisions, that they are out of touch with the community, are living in ivory towers and have no idea of community standards.

One of the dangers in taking the involvement in justice, in the purist sense, out of the hands of members of the community is that we lose even more confidence in our justice system. People often used to ask me, "How could any jury come to a decision like that?" and I would say, "They're people. You tell me. It's not the judge who came to the verdict; it was the jury that came to the verdict—members of the community. So don't blame the courts." People need to have some access to the system in order to have confidence in it. There will always be an opportunity, and many of those opportunities will be justified, to complain about the way a system works. No human system is perfect, but I think one of the strengths of our justice system—although inefficient, inexact, often capricious and wrong—is the fact that it is still anchored to it being part of and accessible by the community. People who grizzle that it is an inconvenience for them to serve on a jury should bear in mind that they may one day need the benefit of that institution and they should hope that people would be as committed to coming to the truth in a case in which they were involved and giving attention to the issues that are being ventilated in that court as desirable to achieve justice rather than expedition. Anecdotally—again, it would be interesting to know the figures that the Attorney General has come up with—in my discussions with judges who have presided over jury trials, I understand that in most cases they agreed with the verdict that was brought down by the jury. They might have had different reasons for it as far as they could discern, but it is very rare that the judge who presided over a trial did not agree with the verdict that was brought down or that it was open to the jury to do so.

I think there is merit in the proposal. I welcome the bill and congratulate Hon Aaron Stonehouse's commitment to and interest in this area. It may ultimately be the way to go, but before we could, in conscience, responsibly support the proposal, we need to get away from the anecdotal stuff that has been canvassed by those who are in support of it and, on the contrary, get some rigorous work done around how it can be best achieved, whether it will work, what the downsides are and how it can be implemented properly. If it is a reasonable proposal and can have discernible benefits, I would revisit my view, but at the moment I feel that we cannot support this noble measure.

HON ALISON XAMON (North Metropolitan) [11.19 am]: I rise as lead speaker on behalf of the Greens and I indicate that the Greens will support the Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017. As members would be aware, we judge every bill on its merits. Whether they are likely to gain passage through the other place is not for us to be concerned with. It is simply what is presented to us. As such, I have quite a lot of comments to make about this bill. We recognise that it is a relatively simple bill and are of the view that some

additional amendments could improve it further. Nevertheless, this bill is important and we are pleased that this issue has been brought to the attention of this chamber for deliberation. I think it is useful to go over what is in this piece of legislation. I have done the cross-jurisdictional analysis and looked at the differences in the way this provision exists in other states. It is instructive to compare how various states have chosen to implement these sorts of measures.

This bill will amend section 118 of the Criminal Procedure Act 2004, which is about when a trial can be heard by judge alone and without a jury. I think it is important to point out things that will not change as a result of this bill being passed. At the moment either the prosecutor or the accused may apply for an order for a trial by judge alone. Applications must be made before the identity of the trial judge is known to the parties and the order cannot be cancelled after the identity of the trial judge becomes known to the parties. That ensures the prevention of judge-shopping. The court can inform itself on such an application in whichever way it sees fit. If the accused does not consent, the order must not be made. If multiple charges are tried together, the order must relate to all of them and they need to be heard simultaneously. Similarly, if multiple accused are being tried together, the order must relate to all of them.

The act currently provides that if an application is made and the accused consents, subject to the aforementioned conditions if there are multiple charges or multiple accused, the court has the discretion to make the order if it considers that it is in the interests of justice to do so. For example, it can make the order if a trial is going to be long or complex and likely to be unreasonably burdensome to a jury, or if a juror is likely to be corrupted or threatened. The court may refuse the order if the trial will involve a factual issue related to objective community standards such as reasonableness, negligence, decency, obscenity and dangerousness. The bill will change this so that if an application is made and the accused consents, subject to the aforementioned conditions if there are multiple charges or multiple accused, the court will have to make the order unless it is satisfied that the order is not in the interests of justice. That judicial discretion will still remain.

I have a question that I would appreciate a response to in the reply to the second reading debate. I seek confirmation that the option we are contemplating will continue not to be available for commonwealth offences for which section 109 of the Constitution requires a jury trial. That is my understanding, but I seek confirmation of that.

Hon Michael Mischin: Unless the law has changed since, 10 years ago the High Court determined that the requirement for a jury under section 80 of the Australian Constitution involved a jury of 12 people, which got rid of the prospect of a majority verdict, which Western Australia has introduced in some cases. What we do here will not affect commonwealth cases. In fact, some of the most complicated cases are the Customs Act and drug importation ones. In those cases, unless I am much astray with what has happened, a unanimous verdict of 12 jurors is still needed and this option would not be available.

Hon ALISON XAMON: I thank the member. That was my understanding as well, but I seek clarification of whether that will be the case.

Hon Michael Mischin: Of course, I may be wrong.

Hon ALISON XAMON: It would be useful to have that clarification.

I want to go through some of the issues that are raised about these provisions. One concern that has been voiced already is the possible extra burden on judges. My office undertook some consultation on this bill. One comment that came back to me was “the judiciary are somewhat ambivalent as they will have to write judgements in any judge-alone case, which is more work for them.” However, the view was expressed to me that, “I can only imagine that it will be one or two judgements a year at most for each of the 30-odd judges on the court. The cost savings will be really significant with the flexibility the court will have without a jury.” This issue was also raised in the second reading speech. It was suggested that the time needed to write reasons will be more than saved by a judge not having to empanel, instruct or direct a jury; being able to intervene to seek clarification or to move counsel along when appropriate; and not having to sit through counsel addresses to the jury. The experience in the Australian Capital Territory was that in 56 per cent of cases between 2004 and 2008, the accused chose to have trial by judge alone rather than by jury. I suggest that if it turns out to be a problem, it can be resolved by funding or administratively via changes to scheduling and country court circuits. On the impact on appellate judges of judge-alone trials, there may be appeals about the content of the trial judge’s reasons, but none regarding the content of the trial judge’s directions to the jury. It would just change the nature of the appeal process. If the number of appeals increases because reasons for decision have been published, which will also increase transparency, that will be resolvable via funding for extra appeal judges. I point out to members that appeals that are properly made are not a bad thing. In fact, appeals are an important mechanism to ensure that we correct faults that arise during the trial process.

Another concern or criticism raised about a negative outcome of judge-alone trials is a possible increased acquittal rate. I like evidence-based approaches and, to be very clear, it is absolutely unconfirmed whether this is true.

A paper presented to the 2011 Australasian Institute of Judicial Administration conference by the then New South Wales senior public defender titled "Trials in NSW by Judge Alone: Recent Legislative Changes" said that figures for that year indicated that judge-alone trials seemed to be increasing the rate of acquittal by 12 to 14 per cent, but that a lack of statistics prevented any comparison being made with past years. A later paper, which was produced in 2015 by Peter Krisenthal, the public defender in Newcastle, entitled "Judge Alone Trials in NSW — Practical Considerations" said that between 1993 and 2007 the judge-alone acquittal rate had been higher than jury acquittal rates. Importantly for me, that is possibly due to medical practitioners agreeing there are mental health matters involved, resulting more often in trials being heard by a judge alone rather than a jury. That seemed to be a step towards justice. But that has changed since 2009 and, again, the reason for that is not clear. In any case, members, I would argue very strongly that the concern should be with the fairness of the trial process and thence the reliability of any conviction, not the rate of acquittal. It should be about making sure that people are getting the fairest possible trial.

With judges sitting alone being obliged to provide their reasons, there is opportunity to discover if they have erred in reaching their verdict and to appeal, if appropriate. Ultimately, it increases transparency quite significantly. In a highly publicised case, the verdict may not be what the media or the community expect and this can lead to criticism of our court processes. Juries do not have to give reasons for their decisions, but judges do. The reasons given by a judge alone will show how the trial judge reached his or her verdict. This is important. It means that people will know exactly why a decision has been made.

Debate adjourned, pursuant to standing orders.